HIGH COURT OF UTTARANCHAL AT NAINITAL.

Reserved

Criminal Appeal No. 1328 of 2001

(Old no.1305 of 1988)

1. Malkeet Singh S/o Apaar Singh Caste Jat Sikh,
2. Surender Singh S/o Teja Singh Caste Jat Sikh,
   Both R/o village Haldi Ghera, P.S. Khatima,
   District Nainital (now Udham Singh Nagar),
3. Deepa @ Daleep Singh S/o Faqir Singh Caste Jat Sikh,
   R/o village Pitrian, P.S. Khatima,
   District Nainital (now Udham Singh Nagar).

…..Appellants.

Vs.

State of U.P.. ……Opp. Party.

Sri R.P. Kotiyal, learned counsel for the appellants,
Sri A. Rab, learned Addl.G.A. for the State.

Coram:-Hon'ble M.M. Ghildiyal, J.
Ho'ble B.C. Kandpal, J.

Dated: Nainital August 18, 2004

(Delivered by Hon. B.C. Kandpal, J.)

This criminal appeal arises out against the judgment and order passed by III Addl. Sessions Judge, Nainital dated 17.05.1988 convicting the appellants u/s 364/34, 302/34 and 201/511 I.P.C. and sentencing them to life imprisonment u/s 364/34 I.P.C. and again life imprisonment u/s 302/34 I.P.C. and five years' rigorous imprisonment u/s 201/511 I .P.C.

The prosecution case, in brief, is that on 01.01.1987 deceased Surender Singh who was running a shop of photographer at Majhola, P.S. Khatima had gone with the accused/appellants Malkeet Singh, Surendra Singh and Deepa @ Daleep Singh (hereinafter called as appellants). Surender Singh, the deceased, after going with the appellants, did not come back to his shop. At 2:30 p.m. when the deceased Surender Singh left the shop, he asked Narender Singh, his

maternal uncle who was by chance present at his shop, to look after the shop till he comes back. Narender Singh was informed by someone that Surender Singh had been murdered and his body was lying over the field of one Naseeb Singh in viallge Haldighera Farm. Narender Singh went at the scene of the occurrence and saw that Surender Singh was lying dead over the plot belonging to Naseeb Singh.

One Mehal Singh (PW4) informed the informant Gurubachan Singh with regard to the murder of his son Surender Singh on 01.01.1987. The complainant Gurubachan Singh immediately reached at the spot and thereafter got the written report scribed by one Balbinder Singh and went to the police station in order to lodge the same. The first information report of the aforesaid incident was lodged at police station on 01.01.1987 at 7:15 p.m.

The postmortem on the body of deceased Surender Singh was conducted by Dr. M. Sharma on 02.01.1987 at 4:10 p.m.

The police investigated the case and after completion of the investigation, submitted the charge sheet against the appellants u/s 302/201/364 I.P.C.

After the submission of the charge sheet, the appellants were committed to the Court of Sessions and they accordingly appeared before the Trial Court in order to face their trial.

The Trial Court i.e. III Addl. Sessions Judge, Nainital framed the charges against the appellants on 05.02.1988 u/s 302/34, 364 and 201/511 I.P.C. The appellants denied of the charges leveled against them and claimed their trial.

The prosecution, in order to support its case, produced P.W.1 Gurubachan Singh (informant), P.W.2 Narender Singh, P.W.3 Karnail Singh, P.W. 4 Mehal Singh, P.W.5 Balkar Singh and P.W.6 S.I. Rajbal Singh.

After the evidence of the prosecution was over, the statements of the appellants were recorded u/s 313 Cr.P.C. The appellants did not adduce any evidence in their defence.

The Court below, after hearing learned counsel for the parties and having perused the evidence on record, convicted the appellants u/s 364/34, 302/34 and 201/511 I.P.C. and sentenced them life imprisonment u/s 302/34 and 364/34 IPC and five years rigorous imprisonment u/s 201/511 I PC, vide judgment and order dated 17.05.1988.

Feeling aggrieved by the aforesaid judgment and order, the convicts preferred the appeal before the Hon'ble Allahabad High Court, which has been transferred to this Court for disposal after creation of State of Uttaranchal.

We have heard learned counsel for the appellants as well as learned Addl. Govt. Advocate and perused the record.

Perusal of the record shows that this case rests on the circumstantial evidence.

The prosecution has put forth the case that the appellants had been lastly seen in the company of the deceased Surender Singh and our attention has been invited towards the statement of P.W.2 Narender Singh who is alleged to have seen the deceased lastly in the company of he appellants.

Perusal of the statement of P.W.2 Narender Singh shows that on 01.01.1987 i.e. the date of occurrence, at about 2:30 p.m. he was sitting in the shop of Surender Singh at Majhola. He has further stated that appellants Malkeet Singh, Surender Singh and Deepa @ Daleep Singh came at the shop and asked deceased Surender Singh to accompany them upto Gurudwara. Surender Singh deceased requested this witness to look after his shop till he returns. Upto 5:00 p.m. the deceased Surender Singh did not come back and a stranger person came over the shop and told that Surender Singh had been murdered and his

dead body was lying over the fields of Naseeb Singh at village Haldighera. This witness reached the place where the dead body was lying and was that Balkar Singh, Mehal Singh and Curubachan Singh as well as certain other persons were also present at that place.

In the cross examination, this witness has stated that he is the maternal uncle of the deceased Surender Singh, therefore, he used to visit his shop off and on.

It is important to mention here that P.W.2 Narender Singh is resident of village Chandely. This witness does not have any shop nearby the shop of the deceased hence presence of this witness at the shop of the deceased Surender Singh, on the date of the occurrence, appears to be by-chance. As per the statement of Narender Singh, the place where the dead body was lying, is at a distance of about 2 1/2 -3 kms. from the place where the shop of deceased Surender Singh situate. The place where the dead body was lying thus, appears to be at a distance of about 12 miles from the residence of Narender Singh, as is evident form the statement of P.W.1 Gurubachan Singh. Therefore, presence of Narender Singh at the shop of deceased Surender Singh on the date of occurrence appears to be certainly by chance. There was no specific occasion available with the witness Narender Singh to remain present at the shop of the deceased Surender Singh on the date of the occurrence. This witness is closely related to the deceased Surender Singh as we have already observed that he is the real maternal uncle of deceased Surender Singh.

It is true that the testimony of the close relative of the interested witness is not to be discarded totally but it would be necessary to scrutinize the testimony of this type of witness thoroughly. In the present case this witness has been produced by the prosecution in order to establish the link pertaining to

the last seen of the deceased in the company of accused/ appellants.

As we have already observed that P.W.2 is the chance witness and his presence at the shop of the deceased on the date of the occurrence appears to be quit doubtful. The deposition of P.W.2 Narender Singh with regard to this fact that he used to visit the shop of deceased Surender Singh, does not appear to be reasonable.

Moreover, merely, being last seen together, is not enough. What has to be established in a case of circumstantial evidence would be the definite evidence to indicate that Surender Singh deceased had been done to death of which the appellants are or must be aware as also proximate to the time of being last seen together. The prosecution has not put forth any such clinching evidence; therefore, it is not possible to establish the commission of murder by the appellants on the basis of the material being made available to the Court.

Apart of the evidence of last seen, it is also important to mention here that in the instant case, the prosecution has produced all the witnesses who are closely related to each other. The prosecution has not cared to produce any of the independent witness in order to make the chain complete. Keeping in view the factor of the relationship with regard to the witnesses produced by the prosecution we have to adopt a careful approach and analyze the evidence to find out whether it is cogent and credible. We have also to find out whether the presence of the witnesses was possible at the time of the particular event of circumstance.

The prosecution has produced P.W.4 Mehal Singh and P.W.5 Balkar Singh, the witnesses who had allegedly seen the appellants taking the dead body towards the forest. These witnesses have stated that they were going on bicycle for

Purchasing grass from Surain jungle and when they were returning from Surain Jungle then at about 3:30 p.m. they saw near the plot of Naseeb Singh that two persons were carrying a dead body and the third was accompanying them. These persons could identity the appellants and they have also stated that when the appellants saw these witnesses then they left the dead body over the field of Naseeb Singh and made their escape good towards the jungle.

Both these witnesses are the 'Samdhies' of P.W.1 Gurubachan Singh who is the informant of this case and is the father of deceased Surender Singh. Both these witnesses appear to be chance witnesses and their presence at the scene of the place, where the dead body was found, becomes highly doubtful.

In case, if the statement of P.W.4 Mehal Singh is perused then it appears that he is the resident of village Chandely which is at a distance of about 13-14 kms. from Surain Jungle and about 12 kms. from Haldighera. This witness has stated that he had gone to Surain Jungle in order to find out the possibility pertaining to the availability of the grass. He has also stated that he did not go Surain Jungle in order to purchase the grass. P.W.5 Balkar Singh is the resident of village Surnapur which is at a distance of about 14-15 miles from Surain Jungle. He has also deposed parrot like repetition in his statement. This witness has also admitted his relationship with the complainant.

It is important to mention here that both these witnesses i.e. P.W.4 Mehal Singh and P.W. 5 Balkar Singh, apart of their being 'Samdhies' of complainant, are residents of different villages, hence going of these witnesses together in order to find out any possibility pertaining to the availability of the grass at Surain Jungle, appears to be highly doubtful. It appears

that the prosecution has planted these witnesses only to make the chain complete but the prosecution could not be succeeded in its attempt. It has clearly come in the deposition of the witness P.W.4 that there is jungle near the village Chandely where this witness resides but he did not got to that jungle in order to find out the possibility with regard to the availability of the grass. It appears to be quite ridiculous as to why these witnesses would be visiting the jungle, which is at a greater distance from their place of residence only in order to purchase the grass, while the jungle for that purpose is available to them situate at the nearby place. The presence of these witnesses at the place, from where the dead body has been recovered, appears to be quite doubtful, and it does not appear probable that these witnesses might have seen the appellants carrying the dead body towards the jungle and after seeing these witnesses; the appellants left the dead body over the field of Naseeb Singh.

It is worthy to mention here that this incident is alleged to have taken place in the broad daylight. The place form where the appellants are alleged to have thrown the dead body, is at a distance of only 75 paces from the house of Naseeb Singh. The hut of the servant of Naseeb Singh is also situate at nearby place. Therefore, under these circumstances, it does not appear to be quite plausible that the appellants had been carrying the dead body through that field towards the jungle and after the witnesses saw them, they left the dead body over the field of Naseeb Singh.

It has also come in the evidence of P.W.4 and P.W.5 that there are 50-60 houses at Haldighera village, therefore, it does not appeal to the reason that how the appellants could be carrying the dead body during the day hours particularly

where the possibility of so many persons could not be ruled out.

Genesis of the prosecution case appears to be completely doubtful particularly, under the circumstances that it is a case of virtually no evidence and whatsoever the evidence, in order to make the chain of circumstances complete has been produced by the prosecution, that too does not appear to be credible and trustworthy. The number of links in the chain are missing. It is not established that actually the deceased Surender Singh was murdered by the appellants. The investigating officer P.W. 6 S.I. Rajbal Singh has deposed in his statement that the deceased Surender Singh was murdered in the farm of Naseeb Singh and the place where Surender Singh was murdered, was disclosed by the appellants before him. This witness has stated that he prepared the site plan pertaining to the place where Surender Singh was murdered on the pointing of appellants.

It is noteworthy that the aforesaid site plan has not been made a part of the record, therefore, it is not clear on the basis of the site plan available on the record that were Surender Singh was actually murdered. The place of murder has also not been shown in the site plan prepared by the investigating officer, which is exhibited as Ext. A-6.

As per the statement of the investigating officer, the place where Surender Singh was murdered is at a distance of 70-80 paces (maximum 100 paces, as is evident from the deposition of P.W.6) from the house of Naseeb Singh. It, therefore, does not appeal to reason that if the murder had been committed by the appellants then as to why hue and cry of the deceased could not be heard by the residents of the nearby place. Had it been a night occurrence, then the matter would have been different but in the instant case the prosecution has come with the clear

Version that the deceased was taken by the appellants during the day hours and he was also murdered during the day hours and the appellants were allegedly seen by the witnesses carrying the dead body of Surender Singh during the day hours also.

Therefore, it appears to be improbable that the appellants had been carrying the dead body towards the jungle during the day hours particularly when a village is adjacent and the possibility of certain persons present over the nearby fields, cannot be ruled out.

The prosecution has assigned the motive also by adducing the evidence of P.W.1 Gurubachan Singh as Gurubachan Singh has deposed in his statement that prior to the date of murder of Surender Singh appellant Malkeet Singh made complaint to him that the deceased Surender Singh used to hurl filthy comments at his sister. This witness has deposed that he tried to pacify the matter but Malkeet Singh did not accede to it. This type of motive attributed to the appellant, certainly does not give and an occasion to murder Surender Singh. At best the motive with the appellants could be to give severe beating to Surender Singh, but anyhow, this type of motive does not give rise an occasion to commit murder. Therefore, the motive adduced by the prosecution appears to be quite weak.

On the basis of the assessment of factual aspect as well as the evidence available on record, in particular circumstances tabulate, we do not find any reason that the circumstances in the present case are formulating the complete chain of evidence without any snap and conclusively pointing to the appellants as guilty persons and to no one else. The involvement of the appellants in the commission of murder of Surender Singh also appears to be doubtful. We, therefore, find ourselves unable to

record our inference that the reasons are conclusive as to be available in the judgment impugned.

Accordingly, the appeal is allowed. The judgment and order dated 17.05.1988 passed by III Addl. Sessions Judge, Nainital convicting the appellants u/s 364/34, 302/ 34 & 201/511 I.P.C. and sentencing them life imprisonment u/s 364/34 and 302/34 I.P.C. and five year's rigorous imprisonment u/s 201/511 I.P.C., is accordingly set aside.

(B.C. Kandpal, J.) **(M.M. Ghildiyal, J.)**

August 18, 2004:
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